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No. 06-173

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In the Supreme Court of the United States

SAN CARLOS APACHE TRIBE,
Petitioner,

v.

STATE OF ARIZONA,
CITY OF SAFFORD, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Arizona

BRIEF IN OPPOSITION

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RESTATEMENT OF QUESTIONS PRESENTED

Jurisdiction. Does this Court have jurisdiction to review the Arizona Supreme Court's decision which only partially resolves the San Carlos Apache Tribe's federal reserved water rights claim?

Following Federal Law. Did the Arizona Supreme Court err when it followed this Court's ruling in *Nevada v. United States* and held that the San Carlos Apache Tribe cannot now claim more water from the Gila River because those same claims were settled in the 1935 *Globe Equity* Decree?

Applying Comity. Did the Arizona Supreme Court raise a new or unsettled federal question by applying comity and deferring the San Carlos Apache Tribe's argument that the United States breached its fiduciary duty in *Globe Equity* to the federal court overseeing the *Globe Equity* Decree?

PARTIES TO THE PROCEEDING

Petitioner San Carlos Apache Tribe ("SCAT" or "Tribe") is a federally recognized Indian tribe claiming at least 943,242 acre-feet of water annually in *In re the General Stream Adjudication of All Rights to Use Water in the Gila River System and Source* ("*Gila River Adjudication*"). Respondent City of Safford ("Safford") is an Arizona municipal corporation that provides utility water service in the Upper Gila Valley asserting claims in the *Gila River Adjudication* to safeguard its water service ability. The other parties to this proceeding likewise claim water rights.

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The Arizona Supreme Court Opinion and Order is reported as *In re the General Adjudication of All Rights to Use Water In the Gila River System and Source*, 127 P.3d 882 (Ariz., 2006). The Order Denying Motion for Reconsideration is reported as *In re the General Adjudication of All Rights to Use Water in the Gila River System and Source*, 134 P.3d 375 (Ariz., 2006). Minute Entry, W1-206 (Aug. 26, 2002) is unpublished. Order, W1-206 (May 17, 2002) is unpublished.

JURISDICTION

The Decision is not a final judgment under 28 USC § 1257(a), and does not fall within any exception to that rule established in *Cox Broadcasting Corp. v. Cohn.*[1]

STATEMENT OF THE CASE

In the mid- to late-1800's, along the Gila River, Congress established the Gila River Indian Reservation and then the San Carlos Apache Reservation. During that same era, non-Indian settlers homesteaded land along the Gila River and its tributaries both upstream and downstream from these reservations. Increasing water demands prompted Congress to authorize building a storage dam on the Gila River to provide water for Indians and non-Indians alike. In 1924, Congress appropriated funds to build Coolidge Dam.

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[1] *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 95 S.Ct. 1029 (1975).

A year later, the United States initiated the *Globe Equity No. 59* lawsuit ("*Globe Equity*") by filing a complaint in federal district court on the Indians' behalf. The lawsuit sought to: (1) establish federal water rights for both reservations; and (2) enjoin virtually all non-Indian water diversions upstream from the reservations.[2] Specifically, the complaint asserted that the United States had "reserved and appropriated ... for and on said Indian Reservations ... all of the waters of the said Gila River and its tributaries",[3] including enough water to irrigate and graze 3,000 acres on the San Carlos Apache Reservation.[4]

Two years later, the United States amended the complaint, adding legal theories to bolster tribal water claims, and focusing on preventing diversions upstream from the reservations by farmers in the Upper Gila Valley and near Coolidge, Arizona. In 1935, the remaining defendants and the United States entered into a court-approved settlement commonly referred to as the *Globe Equity* Decree ("Decree"). For the Indian's benefit, the United States received:

- First priority "immemorial" right to divert 210,000 acre-feet per year for the Gila River Indian Reservation;[5]

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[2] Bill of Complaint, *United States v. Gila Valley Irr. Dist., Globe Equity No. 59*, at 21, 23 (October 2, 1925) (hereinafter "Bill of Complaint").

[3] *Id.*, at 21.

[4] *Id.*, at 6-7.

[5] Decree, *United States v. Gila Valley Irr. Dist., Globe Equity No. 59*, at 14 (June 29, 1935) (hereinafter "*Globe Equity* Decree").

- Second priority 1846 right to divert 6,000 acre-feet per year for the San Carlos Apache Reservation;[6] and

- 1924 priority to divert 603,276 acre-feet per year and store up to 1,285,000 acre-feet per year behind the dam.[7]

Based on the federal government's then-current estimate that the Gila River and its tributaries upstream from the reservations produced a reliable flow of 278,000 acre-feet a year,[8] the Decree granted the United States and the tribes first right to divert 78% of the system's reliable flows, leaving non-Indians only 22%, or 62,000 acre-feet per year.

After allocating and prioritizing water uses, the Decree prohibited parties from re-litigating claims asserted in *Globe Equity*:

> That each and all of the parties [including the United States on behalf of the tribes] to whom rights to water are decreed in this cause...are hereby forever enjoined and restrained from asserting or claiming...any right, title or interest in or to the waters of the Gila River, or any thereof, except the rights specified, determined and allowed by this decree...[and] this Decree shall bind, and inure to the benefits of, the grantees,

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[6] *Id.*

[7] *Id.*, at 72.

[8] Bill of Complaint at 20 ("[t]he low water average run-off per annum of the said Gila River and its tributaries excepting the San Pedro at the said proposed dam site is less than 252,529 acre feet...the flow of the said San Pedro River at all times amounts to one-tenth more or less of the said flow of the Gila River and its tributaries herein above mentioned...").

> assigns, and successors in interest of the owners of rights and parties hereto....[9]

Consistent with this provision, nowhere does the Decree expressly preserve water rights claims for either the Gila River Indian Reservation or San Carlos Apache Reservation.

After approving the Decree, the federal district court retained jurisdiction to administer the water rights documented therein and resolve any conflicts that might arise. Predictably, litigation concerning the Decree's meaning began soon after its entry and has continued ever since. Long ago, SCAT began to exercise its decreed rights, intervened in ongoing litigation, and today the Tribe actively participates in virtually all such litigation.

Meanwhile, after first contesting state jurisdiction, SCAT filed its water right claims in the *Gila River Adjudication* for at least 943,242 acre-feet per year for various uses, including irrigation, stock watering, and fisheries.[10] The Tribe bases these claims on several theories, the majority of which the United States previously asserted for SCAT's benefit in *Globe Equity*.[11] But as the simple comparison below shows, the SCAT claims filed in the *Gila River Adjudication* are essentially the same claims that were settled 71 years ago in *Globe Equity*:

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[9] Decree at 113.

[10] See San Carlos Apache Tribe's Statement of Claimant No. 39-12676, at 2-5, 8-13, 15-16 (hereinafter "SOC No. 39-12676").

[11] *Id.*, at 3; compare Bill of Complaint, Amended Complaint, *United States v. Gila Valley Irr. Dist., Globe Equity No. 59*, (Dec. 5, 1927) (hereinafter "Amended Complaint").

	Claims Asseted in *Globe Equity*[12]	Claim Currently Asserted in the *Gila River Adjudication*[13]
Lands Included	Apache Reservation	Apache Reservation
Basis of Claims Asserted	Reserved rights Prior appropriation Aboriginal rights Treaty of Guadalupe Hidalgo Gadsden Purchase National sovereignty Municipal sovereignty	Reserved, rights Prior appropriation Aboriginal rights Treaty of Guadalupe Hidalgo Gadsden Purchase Federal orders, agreements, decrees Treaties Spanish and Mexican law State law Tribal law Tribal homeland International law
Purposes Identified	Agriculture (irrigation) Stock watering (grazing) Industry	Agriculture (irrigation) Stock watering Industrial Domestic purposes

[12] See Bill of Complaint at 4, 6, 20, and 21; see also Amended Complaint at 11, 17, 19, 21, 22, and 29.

[13] See SOC No. 39-12676; see also United States' Statement of Claimant No. 39-64259 (hereinafter "SOC No. 39-64259").

	Claims Asseted in *Globe Equity*	Claim Currently Asserted in the *Gila River Adjudication*
Purposes Identified	Power Education Administrative purposes	Municipal Mining Wildlife Recreation

Further, SCAT's *Gila River Adjudication* claims allege priority dates predating the 1935 Decree, which means these claims could have been, and should have been, raised in *Globe Equity*. Accordingly, relying on *Nevada v. United States*,[14] Safford and other water right claimants moved for summary judgment to bar SCAT, and the United States on its behalf, from asserting the same claims previously settled in *Globe Equity*. The trial court partially agreed, holding the Decree precludes water claims by SCAT to additional water from the Gila River, but not to water from its tributaries.

SCAT filed a special action interlocutory appeal to the Arizona Supreme Court challenging the lower court's decision that SCAT's claims to the Gila River are barred. Phelps Dodge cross-appealed the trial court's ruling regarding tributary waters. Accepting interlocutory review, the Arizona Supreme Court upheld the lower court's opinion and

[14] *Nevada v. United States*, 463 U.S. 110, 103 S.Ct. 2906 (1983).

remanded the matter back for further proceedings ("Decision").[15]

REASONS THE PETITION SHOULD BE DENIED

I. Introduction.

The Court lacks jurisdicton here, but when jurisdiction exists, the Court will grant review only for compelling reasons.[16] When deciding whether to review a decision by a state court, the Supreme Court generally considers whether the state court decided an important federal question that either: (i) conflicts with relevant decisions by another state court of last resort, a federal court of appeals, or this Court; or (ii) has not been, but should be, settled by this Court.[17]

SCAT is arguing that the Decision conflicts with prior Supreme Court decisions and that it involves important federal questions that this Court should resolve.[18] In making these arguments, however, SCAT virtually ignores this Court's decision in *Nevada*, which is directly on point. Although SCAT relegated this seminal case to footnote status, the state court correctly applied *Nevada*, and in doing so, followed well-settled federal law. Accordingly, the Decision did not conflict with relevant federal law or raise an undecided important federal question.

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[15] *In re the General Adjudication of All Rights to Use Water In the Gila River System and Source*, 127 P.3d 882, 903 (2006) (hereinafter "*Gila VI*").

[16] Rule 10, Rules of the Supreme Court.

[17] Rule 10(b)-(c), Rules of the Supreme Court.

[18] San Carlos Apache Tribe's Petition for a Writ of Certiorari, No. 06-173, at p. 16 (hereinafter "SCAT's Petition").

II. This Court Lacks Jurisdiction because the Decision is not Final.

SCAT is petitioning this Court to review an interlocutory decision by the Arizona Supreme Court. SCAT claims jurisdiction under 28 USC § 1257(a), which provides this Court may review "[f]inal judgments rendered by the highest court of a State . . . ." Judgments are final when they effectively determine the litigation, and are not "merely interlocutory or intermediate steps therein."[19] Further, in *Johnson v. California*, this Court held "a petition for certiorari must demonstrate to this Court that it has jurisdiction to review the judgment",[20] adding:

> Our Rules also require that each party provide a statement for the basis of our jurisdiction in its brief on the merits . . . . It behooves counsel for both petitioner and respondent to assure themselves that the decision for which review is sought is indeed a "[f]inal judgmen[t]" under § 1257. Such attention is mandated by our Rules . . . .[21]

This allows the state proceedings an opportunity to resolve the underlying disputes before the Supreme Court gets involved.[22]

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[19] *Jefferson v. City of Tarrant*, 522 U.S. 75, 81, 118 S.Ct. 481, 486 (1997).

[20] *Johnson v. California*, 541 U.S. 428, 429-430, 124 S.Ct. 1833, 1834 - 1835 (2004) (citing Court's Rule 14.1(g)).

[21] *Johnson*, 541 U.S. at 431-432, 124 S.Ct. at 1836 (citation omited).

[22] *Costarelli v. Massachusetts*, 421 U.S. 193, 196, 95 S.Ct. 1534, 1536 (1975).

In *Cox Broadcasting Corp. v. Cohn*,[23] however, this Court departed from mechanically applying this rule and identified four exceptional situations where it accepts jurisdiction even though proceedings in the lower state courts continue.[24] "In most, if not all, of the cases in these categories, these additional [state] proceedings would not require the decision of other federal questions that might also require review by the Court at a later date...."[25]

In the *Gila River Adjudication*, SCAT is asserting claims to at least 943,242 acre-feet from no specific stream or source based on mostly federal law, including:

> [A]boriginal title, Spanish law, Mexican law, Treaty of Guadalupe Hidalgo, Gadsden Treaty, Treaties with the Apaches, International law, Tribal law, Reserved rights based on Federal law, Tribal Homeland, State law and Territorial law, Executive Orders, Agreements and Understandings with the United States and Court Decrees.[26]

Safford agrees with the Arizona Supreme Court that the Decision is conclusive as to the Gila River mainstem, and therefore, precludes some portion of SCAT's current claim. But under the Decision, SCAT's claims to tributary waters remain unresolved. Undoubtably, SCAT will continue to press these claims in an attempt to establish water rights to the tributaries based on federal law. That means the ongoing state proceedings may give rise to other federal questions

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[23] 420 U.S. 469, 95 S.Ct. 1029.
[24] *Id.*, 420 U.S. at 477, 95 S.Ct. at 1037.
[25] *Id.*, 420 U.S. at 477-478, 95 S.Ct. at 1037.
[26] See SOC No. 39-12676 at 3.

possibly requiring Court review later. Thus, SCAT cannot establish that the federal issues surrounding its claim are resolved, and consequently, it failed to establish that this Court has jurisdiction over the Decision.

III. The Decision does not Conflict with Relevant Federal Law.

A. The State Court Applied Federal Law.

The central issue in this case is whether the Decree entered in 1935 precludes claims now advanced by SCAT, and the United States on its behalf, in the *Gila River Adjudication*.[27] Pronouncements by this Court mandate that the state court must apply federal law "to give the Decree the same preclusive effect as the federal courts would give it."[28] To determine whether *res judicata* bars SCAT's current claims, the state court applied the three federal claim preclusion elements:

> (1) an identity of claims in the suit in which a judgment was entered and the current litigation,
>
> (2) a final judgment on the merits in the previous litigation, and
>
> (3) identity or privity between parties in the two suits.[29]

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[27] *Gila VI*, 127 P.3d at 884.
[28] *Id.*, 127 P.3d at 887.
[29] *Id.*, 127 P.3d at 887-88.

Noting that no parties questioned that the Decree is a final judgment,[30] the state court had to address whether the claims were the same and whether privity existed between the United States and SCAT.[31]

As to the Gila River mainstem, the state court began its analysis by finding that in *Globe Equity*, on SCAT's behalf, the United States asserted various claims based on wide-ranging theories such as "occupancy and possession", reserved rights, and prior appropriation.[32] The United States then settled these claims in the *Globe Equity* Decree for second priority to 6,000 acre-feet. The state court then noted that the Decree expressly precludes additional claims for the SCAT reservation:

> [A]ll of the parties to whom rights to water are decreed in this cause ··· are hereby forever enjoined and restrained from asserting or claiming-as against any of the parties herein ···- *any right, title or interest in or to the waters of the Gila River, or any thereof*, except the rights specified, determined and allowed by this decree, and each and all thereof are hereby perpetually restrained and enjoined from diverting, taking or interfering in any way with the waters of the Gila River or any part thereof····[33]

Based on the Amended Complaint and the Decree, the state court properly held that the United States placed SCAT's water rights to the Gila River at issue and resolved those

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[30] *Id.*, 127 P.3d at 888.

[31] *Id.*

[32] *Id.*, 127 P.3d at 894.

[33] *Id.*, 127 P.3d at 895 (citing Decree at Art. XII)(emphasis added.)

claims. Thus, pursuant to federal law, the state court correctly ruled that SCAT's claims for Gila River water in excess of its decreed rights are barred.[34]

B. The Decision is Consistent with *Nevada*.

The state court's straightforward analysis regarding the Gila River mainstem follows the Decree's express provisions and flawlessly follows this Court's reasoning in *Nevada*. *Nevada*'s facts are almost identical to those presented here. Just like this case, in the early 1900s the United States, on behalf of the Pyramid Lake Indian Tribe, filed a suit known as *Orr Ditch* asserting reserved rights to divert water from the Truckee River.[35] After litigating and negotiating for 31 years, in 1944 the United States settled these claims with non-Indian water users in the *Orr Ditch* consent decree, which enabled the tribe to irrigate 3,130 acres on the reservation with an 1859 priority.[36] That decree expressly enjoined parties from claiming additional rights to the river.[37]

Then in 1973, the United States filed another lawsuit claiming additional reserved water rights for fishing purposes. Although the *Orr Ditch* decree did not expressly preserve any claims, the United States argued that the *Orr Ditch* decree settled only a portion of the reserved water rights.[38] Defendants responded by asserting that the *Orr Ditch* decree settled all claims for the reservation and *res judicata* barred claims for more water.[39] This Court agreed with the

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[34] *Id.*
[35] *Nevada*, 463 U.S. at 116, 103 S.Ct. at 2911.
[36] *Id.*, 463 U.S. at 117, 103 S.Ct. at 2911.
[37] *Id.*, 463 U.S. at 132, 103 S.Ct. at 2919.
[38] *Id.*, 463 U.S. at 119, 103 S.Ct. at 2912.
[39] *Id.*, 463 U.S. at 119, 103 S.Ct. at 2913.

defendants and unanimously held that the claim for more water for fishery purposes was barred by *res judicata* because "it seems quite clear to us that [the United States and Paiute Tribe] are asserting the same reserved right" that was asserted in the first action.[40]

The facts and issues presented in *Nevada* are strikingly similar to those here. In both cases, the United States represented tribal interests and asserted all theories for reservation water rights.[41] The federal government settled both cases by consent decree only nine years apart: *Orr Ditch* in 1944 and *Globe Equity* in 1935.[42] Most importantly, both decrees expressly forbid parties from claiming additional water with very similar language:

The *Orr Ditch* Decree Language

The decree enjoins parties "from asserting or claiming any rights in or to the waters of the Truckee River or its tributaries . . . except the rights, specified, determined and allowed by this decree."[43]

The *Globe Equity* Decree Language

Parties "are hereby forever enjoined and restrained from asserting or claiming – as against any of the parties herein, their assigns or successors, or their rights as decreed herein – any right, title or interest in or to the waters of the Gila River, or any thereof,

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[40] *Id.*, 463 U.S. at 134, 103 S.Ct. at 2920.

[41] See SOC No. 39-12676; SOC No. 39-64259; compare *Nevada*, 463 U.S. at 113, 103 S.Ct. at 2910.

[42] *Globe Equity* Decree; *Nevada*, 463 U.S. at 118, 103 S.Ct. at 2912.

[43] *Nevada*, 463 U.S. at 132, 103 S.Ct. at 2919.

except the rights specified, determined and allowed by this decree."[44]

Knowing the *Globe Equity* Decree expressly prohibits SCAT's claims for more water from the Gila River, the state court applied *Nevada* and barred SCAT's claims for more water from the Gila River, which is both consistent with federal law and correct.

IV. The Decision does not Conflict with Relevant Federal Cases or Raise Important Federal Issues.

Although *Nevada* is directly on point and the state court Decision is consistent with *Nevada*, SCAT avoids *Nevada* in its petition altogether. Instead, the Tribe wrongly argues that the Decision conflicts with *Winters* and *San Carlos*,[45] and attempts to create legal questions it wants this Court to resolve. But these arguments fail because neither *Winters* nor *San Carlos* is on point and this case does not raise a new federal question that this Court need answer.

A. *Winters* is not Relevant to the Decision.

SCAT contends that the Decision conflicts with *Winters* because "without the waters of the Gila River mainstream, the Tribe will be unable to support itself in its 'permanent tribal homeland' as anticipated by this Court in *Winters*."[46] SCAT is suggesting that unless it can take more water from the Gila

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[44] *Globe Equity* Decree at 113.

[45] *Winters v. United States*, 207 U.S. 564, 28 S.Ct. 207 (1908); *Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545, 103 S.Ct. 3201 (1983).

[46] SCAT's Petition at p. 22.

River, the Tribe cannot live on the reservation, and therefore, the Decision conflicts with *Winters*.

While making this argument, however, SCAT ignores that the Decision and *Winters* address different issues. In *Winters*, Congress adopted a treaty creating a reservation in Montana to serve as a permanent home for two Indian tribes.[47] The treaty was silent on water rights. Soon after Congress formed the reservation, settlers upstream began diverting water from the river bordering the reservation. The federal government then brought a lawsuit to enjoin the settlers from interfering with water use on the reservation.[48] This Court held that Congress, by creating the reservation, impliedly reserved all unappropriated river water necessary to effectuate the purposes of an Indian reservation.[49]

In contrast, unlike *Winters*, the Decision does not address the establishment of reserved rights. Here, SCAT's reserved rights had already been asserted and settled over 70 years ago in federal court. The Decision addresses the preclusive effects of that prior litigation which quantified those rights.

SCAT's argument also conveniently ignores that its 6,000 acre-feet per year decreed in *Globe Equity* is just one component of its water resources. SCAT's reservation includes an estimated 19.5 million acre-feet of recoverable groundwater.[50] In addition, it recently settled its claims to the Salt River system for 67,965 acre-feet per year, including

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[47] *Winters*, 207 U.S. at 565, 28 S.Ct. at 208.

[48] *Id.*

[49] *Id.*, 207 U.S. at 576-77, 28 S.Ct. at 2.

[50] See Arizona Department of Water Resources, TECHNICAL ASSESSMENT OF THE SAN CARLOS APACHE TRIBE WATER RIGHTS SETTLEMENT, pp. 5-19 (May 17, 1999).

60,665 acre-feet of Central Arizona Project water.[51] This is a considerable amount of water for a population of under 13,000 members.[52] In contrast, the City of Safford uses approximately 6,000 acre-feet a year to meet the water demands of 25,000 people and ancillary uses. Thus, arguing that the Decision leaves SCAT dry, and thereby contradicts *Winters*, is nonsense.

B. *San Carlos* is not Relevant to the Decision.

The Tribe's argument that the Decision conflicts with *San Carlos* is wrong as well. Like *Winters*, the Decision deals with entirely different issues than those presented in *San Carlos*.

Whereas the Decision addresses the preclusive effects of a prior water rights decree of an Indian tribe, *San Carlos* deals with state jurisdiction over Indian water right claims. *San Carlos* is the sequel to *Colorado River Conservation District v. United States,*[53] where this Court held that the McCarran Amendment provides state courts with jurisdiction to adjudicate Indian water right claims held in trust by United States, and that suits brought in federal court were properly stayed in favor of concurrent state court adjudication.[54] Following *Colorado River*, the United States joined the then-ongoing Arizona general stream adjudications. But SCAT and other Indian tribes from Arizona and Montana spurned the state court adjudications and filed suits to resolve their

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[51] *Id.*, at pp. 3-1.

[52] SCAT's Petition at p. 2.

[53] *Colorado River Conservation District v. United States,* 424 U.S. 800, 96 S.Ct. 1236 (1976).

[54] *Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545, 548-549, 103 S.Ct. 3201, 3204 - 3205 (1983).

water right claims in federal district court. This action by the tribes raised what this Court called two issues "parallel" to *Colorado River*:

> (1) What is the effect of the McCarran Amendment in those States which ... were admitted to the Union subject to federal legislation that reserved "absolute jurisdiction and control" over Indian lands in the Congress of the United States?
> (2) If the courts of such States do have jurisdiction to adjudicate Indian water rights, should concurrent federal suits brought by Indian tribes, rather than by the United States, and raising only Indian claims, also be subject to dismissal under the doctrine of *Colorado River*?[55]

Consistent with its earlier decision, the *San Carlos* Court held that, regardless of general federal limitations of state jurisdiction over Indian matters, the McCarran Amendment grants state courts jurisdiction to adjudicate Indian water right claims.[56] This Court further held that the district courts usually should defer to the state general stream adjudications.[57] These holdings are not relevant to the *res judicata* issues presented in the Decision. Accordingly, the Decision does not directly conflict with *San Carlos*.

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[55] *Id.*, at 463 U.S. 549, 103 S.Ct. at 3205.
[56] *Id.*, 463 U.S. at 564-65, 103 S.Ct. at 3212.
[57] *Id.*, 463 U.S. at 570, 103 S.Ct. at 3215.

V. The Decision's Application of Comity does not Raise an Unsettled Important Federal Question.

The state court action did not raise a new or unsettled federal question by deferring SCAT's argument that the United States breached its fiduciary duty in *Globe Equity* to the federal court overseeing the Decree. This Court has long held that when the federal government represents a tribe in court, the outcome binds both the United States and the tribe.[58] Consistently, the *Nevada* Court found that the United States had represented tribal interests in the *Orr Ditch* water rights litigation and held that the *Orr Ditch* decree bound the tribe and precluded its additional reserved rights claims.[59] Similarly, the United States represented SCAT in *Globe Equity* and resolved its reserved rights claims to the Gila River. Thus, the United States' representation of SCAT in *Globe Equity* binds SCAT now. The Decision merely applied well-settled law.

To avoid this rule, SCAT argues that the United States' representation in *Globe Equity* was inadequate and that the state court's refusal to allow it to "present" this claim – instead of deferring the issue to the federal courts under the

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[58] See *Nevada*, 463 U.S. at 135, 103 S.Ct. at 2921; *Heckman v. United States*, 224 U.S. 413, 443-46, 32 S.Ct. 424, at 433-34 (1912); *Arizona v. California*, 460 U.S. 605, 626-628, 103 S.Ct. 1382, 1395-1396 (1983).

[59] *Nevada*, 463 U.S. at 135, 103 S.Ct. at 2921 (citing *Heckman v. United States*, 224 U.S. 413, 32 S.Ct. 424, where it plainly said that "it could not, consistently with any principle, be tolerated that, after the United States on behalf of its wards had invoked the jurisdiction of its courts . . . these wards should themselves be permitted to relitigate the question." *Id.*, at 446, 32 S.Ct., at 435. See also Restatement (Second) of Judgments § 41(d) (1982)).

comity doctrine – violates federal law. This argument is misplaced for several reasons.

First, the United States did not breach its fiduciary duty to SCAT. In the early 1900s, the United States simply observed that SCAT had few irrigable acres and believed the Tribe was better suited to raising cattle rather than farming.[60] SCAT's decreed water allocation reflects the reservation's geographic realities and economic viabilities in the early 1900s rather than a breach of fiduciary duty.

Second, the state court did not stop SCAT from presenting its defenses to summary judgment. SCAT had every opportunity to make all of its arguments in response to the motions, and it made those arguments, but none were persuasive enough to overcome the express preclusions in the Decree and the binding precedent set forth in *Nevada*. Moreover, as the party seeking to defeat summary judgment, SCAT was required to "wheel out all its artillery to defeat it" at the time of the motion.[61] The state court did not have to establish additional hearings to determine if there was

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[60] See Report on San Carlos Reservation from Supervisor Charles E. Dagenett to Commissioner of Indian Affairs, at 3-4 (April 14, 1922) ("This Reservation is essentially a stock country and these people take much more readily to working stock than they do to farming, and every possible effort should be made to develop their stock industry, rather than farming, especially where the water has to be secured by pumping."); see also Letter from Superintendent Kitch to Commissioner (June 13, 1928) ("[T]hese Indians could be placed at a much better advantage in the cattle industry as farming was found not to be profitable and to be costing more from tribal funds each year than was derived.).

[61] *Employers Ins. of Wausau v. Bodi-Wachs Aviation Ins. Agency, Inc.*, 846 F.Supp. 677, 685 (N.D. Ill. 1994).

additional evidence that might support SCAT's claim that the United States inadequately represented the Tribe in *Globe Equity*.

Third, even if the federal government had inadequately represented SCAT, which Safford disputes, then the Tribe should have asserted that claim against its trustee in the Indian Claims Commission for monetary damages; not against parties to the Decree in state proceedings seeking more Gila River water. Congress gave the Indian Claims Commission exclusive jurisdiction over tribal claims that the United States either failed to engage in fair dealings or breached a fiduciary duty owed to tribes.[62] This Court's pronouncements in *Nevada* clarified that the proper forum for tribal assertions regarding the quality of federal representation in water right lawsuits was the Indian Claims Commission.[63] That forum is where SCAT should have sought its remedy against the United States.[64] The *Gila River Adjudication* is not the proper

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[62] See Indian Claims Commission Act, 60 Stat. 1049, 25 U.S.C. § 70 *et seq.* (1976 ed.)(Establishing an Article I tribunal with power to decide claims of Indian tribes against the United States); See generally *United States v. Dann,* 470 U.S. 39, 105 S.Ct. 1058 (1985).

[63] *Nevada*, 463 U.S. at 135 n.14, 103 S.Ct. at 2921 n.14 ("We, of course, do not pass judgment on the quality of representation that the Tribe received. In 1951 the Tribe sued the Government before the Indian Claims Commission for damages, basing its claim of liability on the Tribe's receipt of less water for the fishery than it was entitled to. *Northern Paiute Tribe v. United States*, 30 Ind.Cl.Comm. 210 (1973). In a settlement the Tribe was given $8,000,000 in return for its waiver of further liability on the part of the United States.").

[64] See *Nevada*, 463 U.S. at 145, 103 S. Ct. at 2926 (Brennan, J., concurring) ("If, however, the United States actually causes harm through a breach of its trust obligations the Indians should have a

forum to appraise whether the United States adequately represented SCAT 71 years ago in *Globe Equity*. The *Gila River Adjudication* court is supposed to determine the scope and extent of water rights. It does not have the jurisdiction to invalidate a federal decree and grant SCAT additional Gila River water rights in degradation of other Decree parties' water rights. Even if SCAT had a valid breach of fiduciary duty claim against the United States, it chose the wrong forum and sought the wrong remedy.

Fourth, the law is clear that a party contesting a federal district court ruling must seek relief from that ruling in that same court.[65] The Restatement of Judgments clearly states, "[r]elief from a judgment must be obtained by means of a motion for that purpose in the court that rendered the judgment."[66] Further, here the federal district court has continuing jurisdiction over the Decree, and SCAT has been a party to those proceedings since 1990. SCAT has never raised the inadequate representation issue in that forum, apparently because the Tribe believes that the *Globe Equity* court would not allow it to pursue its preferred remedy, i.e., to obtain more water from the Gila River. But this is no reason for the state court to consider an issue that may destroy

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remedy against it. I join the Court's opinion on the understanding that it reaffirms that the Pyramid Lake Paiute Tribe has a remedy against the United States for the breach of duty that the United States has admitted. ").

[65] *Orion Tire Corp. v. Goodyear Tire & Rubber Co., Inc.*, 268 F.3d 1133, 1136 (9th Cir. 2001); *Plotner v. AT&T Corp.*, 224F.3d 1161, 1170 (10th Cir. 2000); *Watts v. Pinckney*, 752 F.2d 406 (9th Cir. 1985).

[66] Restatement (Second) of Judgments § 78.0(b).

the long-established balance of a federal decree, especially where the federal court retains jurisdiction over the subject matter.

Finally, in its petition, SCAT relies on policy statements pronounced in *San Carlos* to argue that the state court cannot apply the comity doctrine. In that case, this Court noted the judicial bias against piecemeal litigation where both state and federal courts might duplicate efforts, waste resources, and rush to judgment.[67] But this dicta is not controlling federal law and should not prevent the state court from employing the comity doctrine by deferring to the federal district court with continuing jurisdiction over the Decree. The state court's application of comity ensures that SCAT's breach of fiduciary duty argument is not heard in the wrong forum, efforts will not be duplicated, resources will not be wasted, and there will not be two competing decisions. Clearly, the state court correctly applied the comity doctrine in the Decision.

VI. Conclusion.

The Decision is <u>not</u> a final judgment under 28 USC § 1257(a), and does not fall within any exception to that rule. Even if this Court had jurisdiction to hear the issues raised, SCAT's petition should be denied because the Arizona Supreme Court followed well-settled federal law holding that SCAT's claims to take more water from the Gila River are barred by the preclusive effects of the *Globe Equity* Decree. Further, the state court's application of the comity doctrine did not raise an unsettled important federal question. Accordingly, SCAT's petition should be denied.

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[67] *San Carlos*, 463 U.S. at 547, 103 S.Ct. at 3204.

Respectfully Submitted,

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